83-939

Office - Supreme Court, U.S.
FILED
DEC 5 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

VIRGIL REDMOND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. WAYNE GILLMAN
431 South 300 East, Suite 101
Salt Lake City, Utah 84111
Telephone: (801) 322-1616
Attorney for the Petitioner
Virgil Redmond

QUESTIONS PRESENTED

1. Was the Petitioner deprived of his right to due process of law and a fair trial by virtue of the trial court's charge to the jury which had the effect of relieving the government of the burden of proof on the element of intent.

2. Is Petitioner entitled to reversal or vacation of his conviction by way of the post-conviction remedies south by Petitioner?

3. Did the District Court and the Court of Appeals err by denying Petitioner the relief sought by him?

TABLE OF CONTENTS

Questions Presented for Review i

Decisions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of the Case 5

Reasons for Granting the Writ

I PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW WERE DENIED BY THE TRIAL COURT BY THE GIVING OF FORBIDDEN AND UNCONSTITUTIONAL INSTRUCTION TO THE TRIAL JURY 7

II PETITIONER IS ENTITLED TO REVERSAL OR VACATION OF HIS CONVICTION BY WAY OF POST-CONVICTION REMEDIES PROSECUTED BY PETITIONER 10

III THE COURTS BELOW COMMITTED ERROR IN DENYING PETITIONER THE RELIEF SOUGHT BY HIM 13

Conclusion 17

Appendix A 19

Appendix B 21

Appendix C 31

Appendix D 40

TABLE OF AUTHORITIES

CASES

Fay v. Noia, 372 U.S. 391 (1963) 12, 13
Grimes v. U.S., 607 F. 2d 6 (2nd Cir. 1979) 12
In Re Winship, 397 U.S. 358 (1970) 8
Kaufman v. U.S., 394 U.S. 217 (1969) 11, 13, 14

Morissette v. U.S., 342 U.S. 246 (1952) 9, 10, 16, 17
Sanders v. U.S., 373 U.S. 1 (1963) 12, 13
Sandstrom v. Montana, 442 U.S. 510 (1979) 9, 10, 16
Tucker v. U.S., 427 F.2d 615 (D.C. Cir. 1970) 12, 13
U.S. v. Frady, 456 U.S. 152 (1982) 15, 16, 17
U.S. v. Haywood, 464 F. 2d 756 (D.C. Cir. 1972) 11, 13
U.S. v. Morgan, 346 U.S. 502 (1953) 14
U.S. v. United States Gypsum,
438 U.S. 422 (1978) 9, 10, 16, 17
Willis v. U.S., 654 F. 2d 23 (8th Cir. 1981) 14, 15

STATUTES

United States Constitution, Fifth Amendment 2
15 U.S.C. 77q(a) 3
28 U.S.C. 1651 3
28 U.S.C. 2255 3

No.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

VIRGIL REDMOND

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF
APPEALS FOR THE TENTH CIRCUIT

Petitioner, Virgil Redmond, respectfully petitions this Court to issue its Writ of Certiorari to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the District Court in this case, dismissing the Petitioner's case, which order of the Court

of Appeals was entered September 8, 1983, the mandate having been filed September 12, 1983.

DECISIONS BELOW

The Order of the Court of Appeals dated September 8, 1983, and the decision of the District Court, dated December 7, 1982, appear as Appendix A and Appendix B respectively, attached hereto.

Because peitioner deems them necessary for a full understanding of the case and proper consideration of this Petition, the Order of Dismissal entered by United States District Judge Winner, and the report and recommendation of the United States Magistrate, Daniel A. Alsup, dated December 21, 1981, are also attached as Appendix D and Appendix C respectively.

JURISDICTION

This petition for certiorari is filed under jurisdiction provided by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

> No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of Grand Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a wit-

ness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 15:

Section 77q(a). It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly:

(1) To employ any device, scheme or artifice to defraud.

United States Code, Title 28:

Section 1651(a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in eight of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or a rule nisi may be issued by a justice or judge of the court which has jurisdiction.

United States Code, Title 28:

Section 2255. A prisoner in custody under sentence of the court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the Court

was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or as otherwise subject to collateral attack, may move the court which imposes sentence to vacate, set aside or correct the sentence. (emphasis added)

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and to make Findings of Fact and Conclusions of Law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct sentence as may appear appropriate.

A court may entertain and determine such motion without required the production of the prisoner at the hearing.

The sentencing court shall not be reqired to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a Writ of Habeas Corpus.

An application for a Writ of Habeas Corpus in behalf of a prisoner who is authorized to apply for relief by a motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

Petitioner comes before this court seeking review of denial by the courts below of post-conviction relief. However, brief review of the entire history of the proceedings is required for a complete understanding of the procedural posture of this case.

Petitioner was convicted in early October, 1975, on nine of ten counts of an indictment charging mail frauds in violation of 15 U.S.C. Section 77q(a). His conviction was affirmed by the United States Court of Appeals for the Tenth Circuit, *United States v. Redmond*, 546 F. 2d 1386 (10th Cir. 1977). A petition for rehearing was denied as was a subsequent petition for a writ of certiorari to this court, *United States v. Redmond*, 435 U.S. 995 (1978) (Memorandum Order). The error asserted in this petition was not asserted in the direct appeal process.

Petitioner, acting pro se, then sought relief pursuant to Rule 35, Federal Rules of Civil Procedure, granted in large part, and then sought, pursuant to 28 U.S.C. Section 2255 (Redmond v. United States, No C-79-310, D. Ut. filed May 30, 1979) to set aside the conviction and sentence; this petition, which did

not raise the error asserted here, was denied summarily. Petitioner then filed a second 2255 petition raising for the first time the issue set forth herein, that being in the invalidity of his conviction due to the trial court's instruction to the jury, set forth more fully below, which relieved the prosecution of the burden of proof on the pivotal question of intent.

The District Court, Judge Winner, presiding, summarily denied that petition, ruling that the relief sought was not within the scope of Section 2255. (See Appendix D) Petitioner still acting pro se, did not appeal that ruling instead filing on August 25, 1981, the present action, seeking relief pursuant to 28 U.S.C. 2241, again, raising the issue of the defective jury instruction.

Following argument and briefing by the parties, United States Magistrate, Daniel Alsup, issued the report and recommendation which is attached hereto as Appendix C. The Magistrate ruled that relief under Section 2241 was not appropriate, but, affording the pro se petition liberal construction, ruled that the petition should be construed as one seeking relief in the nature of coram nobis, under Section 2255, and ruled that the petition should be granted, there having been no waiver by the petitioner of the constitutional rights asserted, and no prior consideration of the issue by any court. (Appendix C)

The District Court held arguments on the Magistrate's report and recommendation, but took no evidence. The court then entered its ruling, attached hereto as Appendix B, in part adopting and in part rejecting the Magistrate's report. The District Court did not reject the Magistrate's finding that no court had considered this issue, or that petitioner had not waived it, but, nevertheless denied relief, essentially on two grounds: the court again narrowly construed Section 2255 and ruled that coram nobis was not appropriate for the type of relief sought; and that the petition was successive.

Petitioner then appealed to the United States Court of Appeals for the Tenth Circuit, which court affirmed the

decision of the District Court, stating that petitioner's actions had been properly treated as motions pursuant to 28 U.S.C. 2255, but, ruling that petitioner had not shown cause and prejudice for the failure to object to the challenged instruction at trial, or assert the unconstitutionality on direct appeal. (Appendix A).

Petitioner has, to date, had no ruling on the merits of this petition by any court. On each occasion when this issue was raised, the courts denied relief ruling, in all but one instance, that petitioner had not given the proper title to his petition; the Tenth Circuit ruled that petitioner had failed to show cause and prejudice, even though petitioner had never had a full hearing on the merits of the petition.

REASON FOR GRANTING THE WRIT

I

PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW WERE DENIED BY THE TRIAL COURT BY THE GIVING OF FORBIDDEN AND UNCONSTITUTIONAL INSTRUCTION TO THE TRIAL JURY

Petitioner's conviction, under 13 U.S.C. Section 77q(a) was for an offense which required proof of fraudulent intent. In instructing the jury on this question, the District Court, in the person of then Chief Judge Willis Ritter, instructed the jury as follows:

> "You are instructed that an essential element of the securities offenses charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.
>
> Intent, as used here, means that a defendant must

have had the purpose or willingness to defraud in his mind. Existence of intent to devise or conduct such a scheme may be shown by the facts and declarations of the parties concerned and the surrounding circumstances as well as by direct evidence.

Experience shows that direct evidence of fraudulent intent is not generally to be expected, and for that reason, the law permits a resort to circumstantial evidence as a means for finding the truth. Moreover, since intent is largely a state of mind and it is impossible to look into a man's mind to see what went on, the only way you have to determine that question is to take into consideration all the facts and circumstances shown by the evidence. And one must also bear in mind that an intent may be inferred from the act, itself. For it is the law that a person intends the usual and probable consequences of his act." (emphasis added)

There can be no question by that in so instructing the jury on the question of intent, the trial court committed error of constitutional dimension in that the instruction required the jury to presume fraudulent and criminal intent, rather than requiring the prosecution to prove it. In the case of ***In Re Winship***, 397 U.S. 358, 25 L. Ed 2d 368, 90 S. Ct. 1068 (1970), this court specifically held,

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact if necessary to constitute the crime with which he is charged. 25 L. Ed 2d 368, 375

As the magistrate found, a finding the District Court evidently adopted and as the government does not dispute, the charge of the use of the mails in the fraudulent sale of securities, requires proof of the element of criminal intent. The government should therefore have been required to prove that element, rather than it being presumed by way of the court's instruction as quoted above.

In *Morissette v. United States*, 342 U.S. 246 (1952), this court had before it a case in which the trial court had ruled that the defendant's felonious intent was presume by his acts. This court ruled that such an instruction was entirely improper particularly in cases involving forms of larceny or theft and in that case the court reversed the petitioner's conviction, ruling that that instruction had the effect of having the court, rather than the jury, decide the issue of intent, based upon an apparently conclusive presumption of law, which this court ruled was constitutionally impermissible.

This principle was reaffirmed and expanded in later decisions of this court including *Sandstrom v. Montana*, 442 U.S. 510 (1979) and a decision of particular applicability to the present situation, *United States v. United States Gypsum Company*, 438 U.S. 422 (1978). In the *United States Gypsum* case, the government had charged criminal violations of the anti-trust statues. The defendants had evidently exchanged certain information relating to product pricing, which exchanges, defendants contended had been for the purpose of ensuring compliance with the Robinson-Patman Act, and had not been made with the intention of fixing prices. The trial court, however, instructed the jury,

> "The law presumes that a person intends the necessary and natural consequences of his act. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties are presumed, as a matter of law, to

have intended the result."

This court held that because criminal intent was an element of a charged criminal anti-trust violation that so instructing the jury had been constitutional error requiring affirmance of the decision of the Court of Appeals, which court had reversed the convictions.

Comparing the situation existing in the *United States Gypsum* case, with the statute under which the petitioner herein was originally convicted, the constitutional violation become manifestly clear. In *United States Gypsum*, the trial court had essentially stated that if the effect of certain activities on the part of the defendants had a certain result then the criminal intention to achieve that prohibited result would be presumed. Likewise, at the petitioner's trial, the court told the jury that criminal intent could be presumed, and in fact that if the jury found that prohibited consequences were the result of activities on the part of the defendants, that the law requires that criminal intent be found.

It simply cannot be disputed at this point that, petitioner's constitutional due process rights were violated and that as in *Morissette, Sandstrom* and *United States Gypsum*, petitioner is entitled to have his conviction set aside.

II

PETITIONER IS ENTITLED TO REVERSAL OR VACATION OF HIS CONVICTION OR OTHER RELIEF PURSUANT TO POST CONVICTION REMEDIES PROSECUTED BY PETITIONER

The type of relief sought by the petitioner is available to him by way of a motion pursuant to 28 U.S.C. Section 2255. It was not disputed below, by the courts or by the government, that there has been no waiver of the issue by the petitioner

and Section 2255 has been construed by this court to allow the courts power and discretion to enter whatever relief was deemed appropriate whenever an individual was convicted in violation of the Constitution of the United States, and should a court, as the courts in this case have done, fail to see beyond the form of the petition, and go on to the substance and merit of the claim, then those courts commit error.

In *Kaufman v. United States*, 394 U.S. 217 (1969), this court faced the question of whether a claim of a federal prisoner that he was convicted on evidence obtained in violation of his constitutional rights would be cognizable in a post conviction proceeding under 28 U.S.C. 2255 where he had not raised an issue on direct appeal. The District Court had ruled that he could not, but this court reversed holding that the relief sought, in view of the constitutional defect in the conviction, could not be denied solely on the ground that he had failed to appeal directly following the conviction. This court also noted in that case, that relief under Section 2255 is allowable in any case where a claim for relief might be cognizable under Habeas Corpus; in other words, Section 2255 is a remedy of great depth and scope.

In *United States v. Haywood*, 464 F. 2d 756 (D.C. Cir. 1972) a petitioner sought, under Section 2255, to challenge the admission by the trial court of illegally seized evidence. There had been no objection to the admission of the evidence at trial and he had not raised the issue on direct appeal. The court held that the simple failure to raise the question on direct appeal was not dispositive of the issue; rather, the question should be whether or not there had been a deliberate bypassing of the ordinary procedures available to the appellant. The court held that there must be a finding of an intentional relinquishment or abandonment of a known right or privilege. The courts held:

> "Relief should not be denied unless the prior failure to vindicate a claim was understandingly

> and knowingly waived after consultation with competent counsel or otherwise for strategic tactical or any other reason fairly described as deliberate and only after the federal court has satisfied itself, by holding a hearing or by some other means of the facts bearing upon the applicant's default . . . the standard hereby put forth depends on the considered choice of the petitioner." 464F. 2d 756, 762

This decision was, of course, an application of the rules set forth in *Fay v. Noia*, 372 U.S. 391 (1963), the principles of which had been made applicable to federal collateral attack by way of *Sanders v. United States*, 373 U.S.1 (1963). The important teaching of the *Sanders* decision, it should be pointed out, is that where a petition raises issues which if resolved favorably to the petitioner would mandate relief, then the court should proceed to take such steps as would be required to afford that relief, going again to the substance and merits of a petition, looking beyond form or title which was placed upon the petition.

There are numerous decisions of the courts which have held that where a Section 2255 claim based upon a significant denial of a constitutional right, or an error of constitutional dimension is made, the petition or motion should be considered on its merits, even though the point could have been raised on direct appeal and the petitioner had not done so. *Tucker v. United States*, 427 F. 2d 615 (D.C. Cir. 1970), *Grimes v. United States*, 607 F. 2d 6 (2nd Cir. 1979). The *Grimes* court, it should be noted, allowed Section 2255 collateral attack based upon an error of law, not of fact, and the *Tucker* court held, citing *Fay v. Noia, supra*, that if a question of waiver is raised that the court should conduct an evidentiary hearing and make Findings of Fact with respect to that question; this, of course, would appear to be no more than is required by the statute itself.

In this case, the magistrate in his report and recommendation ruled, simply on the basis of the case law in the area, that there had been no waiver of this right and the District Court did not specifically refuse to adopt that position; the District Court's dismissal of the case was on other grounds. There has never been a hearing held during which the petitioner could have presented facts and evidence relating to that question, nor did the District Court enter and make Findings of Fact and Conclusions as required by the statute. Clearly, 28 U.S.C. Section 2255 is a proper statutory basis for this action and petitioner is entitled to the relief he seeks. It is a matter of law that there has been no waiver of the rights petitioner now asserts, and in any event, the court below held no hearing, as required by *Fay v. Noia, supra,* and *Tucker v. United States, supra,* and has made and entered no Findings of Fact and Conclusions of Law on that question.

III

THE COURTS BELOW, AND EACH OF THEM, COMMITTED ERROR IN DENYING PETITIONER THE RELIEF SOUGHT BY HIM

The rulings of the various courts below, attached hereto as appendicies, show that in each instance error was committed in denying the petitioner the relief sought by him.

As noted, Judge Winner's denial of the first petition which the petitioner asserted this error was based upon the erroneous assumption that Section 2255 of Title 28, United States Code, is too narrow in scope to permit this sort of collateral attack. The decisions discussed in Point II of this petition, specifically, *Kaufman v. United States, supra, Tucker v. United States, supra, Fay v. Noia, supra, Sanders v. United States, supra,* and *United States v. Haywood, supra,* should all serve to demon-

strate that Section 2255 is easily sufficiently broad to encompass this form of relief.

Judge Jenkins in his order dismissing this petition, appeared to rely upon two erroneous propositions of law, they being that first, the petition was construed by the magistrate as seeking relief in the nature of coram nobis and that because coram nobis was historically used for correction of errors of fact and petitioner's allegations involved an error of law, that relief should, under Section 2255, be denied; and second, that the petition was successive and thus, subject to dismissal pursuant to the authority of *Willis v. United States*, 654 F. 2d 23 (8th Cir. 1981).

The District Court was in error on both counts. As has already been demonstrated, Section 2255 has been held to be broad enough to encompass all forms of relief which might be granted on collateral attack in post conviction proceedings and the courts should, in seeking to do justice, not place overly restrictive construction upon either the statute, or the title that a petitioner may attach to his request for relief. While Judge Jenkins may have been correct in concluding that historically coram nobis was used only for correction of errors of fact, the teaching of the holding of this court in *Kaufman v. United States, supra*, would clearly appear to require the conclusion that relief under Section 2255, whether titled coram nobis or something else, is available to the petitioner in this case. A decision of this court involving somewhat similar confusion in respect to the choice of remedy, was *United States v. Morgan*, 346 U.S. 502 (1953). In that case, the petitioner's papers had been labeled as though they had sought a common law writ of error coram nobis, but, the court found that the nature of the motion actually indicated that the petitioner was seeking a different form of relief. The court, ignoring the form and looking to the substance of the petition, as the courts below, in this case, should have done, ruled that if the record and the petition demonstrates a right to relief, the Federal

Court should act in doing justice notwithstanding that the request might be improperly labeled or titled.

The District Court's reliance on ***Willis v. United States, supra,*** is also misplaced, because in ***Willis,*** the petitioner had been afforded a full hearing and ruling on the substantive merits of his petition. Thereafter, the petitioner who had not appealed, raised the same issue by way of a petition for coram nobis pursuant to 28 U.S.C. Section 1651, the so called all writs statute. The trial court denied relief on that second petition and the Eighth Circuit Court of Appeals upheld that denial on the basis that the second petition was truly successive. In this case, however, the petitioner has never yet had a ruling on the substantive merits of his petition.

Finally, the Court of Appeals below, affirmed the decision of the District Court, in reliance on the decision of this court in ***United States v. Frady,*** 456 U.S. 152 (1982), holding that petitioner had failed to show cause and prejudice for the failure to object to the challenge instructions at trial or the failure to assert their uncontitutionality on direct appeal.

It is, of course, true that in ***United States v. Frady,*** this court indicated that the plain error standard would not be applied in the ***Frady*** case where the petitioner, after not raising the issue on direct appeal, on collateral attack raised a question somewhat similar to that presented here. However, that decision does not appear to be applicable to the present situation for a number of reasons.

First, petitioner would dispute that he has failed to demonstrate cause and prejudice, or that any Finding of Fact and Conclusion of Law entered following a full evidentiary hearing exists upon which the Court of Appeals could have based that conclusion. It should be remembered that the magistrate ruled and the District Court did not dispute that petitioner had never waived his constitutional claim. Petitioner was never afforded an opportunity to present evidence bearing upon the question of the failure to appeal the issue directly

following his conviction and indeed until the Court of Appeals entered the ruling herein appealed from, none of the courts below apparently even considered the necessity of inquiring, by way of an evidentiary hearing, into the question of why direct appeal of the issue was not prosecuted, or why in the face of the decision of this court in ***Morissette v. United States, supra,*** the prosecutor in the case requested the unconstitutional instruction, why the court consented to give it, and why counsel at the trial failed to object. Certainly if ***United States v. Frady, supra,*** is deemed applicable to this situation (which petitioner disputes) then petitioner should have been afforded an opportunity to present such evidence. He was not.

As to the showing of cause why an appeal was not prosecuted from Judge Winner's ruling on the first Section 2255 petition which raised this issue, it must be remembered that the petitioner was at that time acting pro se and that a United States District Court Judge had ruled that Section 2255 was not the appropriate remedy. Certainly, it has been adequately demonstrated herein that that ruling was in error, but, the reaction of the pro se petitioner, a laymen, to go back to the first step and seek a statute or a title for his petition which might be acceptable to the court, is understandable in view of the position occupied by the figure who had told him that he had chosen the wrong remedy.

It should also be remembered that once the petitioner did file the present petition, it was filed under Section 2241 and even then, after some passing of the case back and forth between the courts, the magistrate concluded that it really should have been under Section 2255 all along.

As to the position taken by the Court of Appeals that petitioner has failed to show prejudice, petitioner would reply in two ways. First, it would appear, based upon the decisions of this court in ***Morissette, Sandstrom,*** and ***United States v. United States Gypsum,*** that the instruction given in the trial of this case was unquestionably unconstitutional and pre-

judicial to the petitioner's trial. Second, even if it is determined that the decision of this court in *United States v. Frady, supra,* should be applied to this case, petitioner should not now be penalized for a failure to present evidence bearing upon the question of prejudice. The *Frady* decision was entered after the present petition was filed and as noted above, until the Tenth Circuit Court of Appeals entered the ruling herein appealed from, the lower courts, including the United States Magistrate and the District Court, had all decided this case on questions of law, not of fact, and no evidentiary hearing was ever scheduled.

Finally, careful review of the opinion of this court in *United States v. Frady, supra,* reveals that it is factually inapplicable to the present situation. *Frady* involved questions of intent bearing upon different degrees of homicide, whereas this case involves a theft or larceny type offense. This Court, in *Morissette v. United States, supra,* took great pains to establish the important reasons for insuring in such cases, that the prosecution would be required to prove the element of intent, as opposed to allowing the court or jury to assume the existence of that element, based upon a defendant's activities. Those requirements were reaffirmed in *United States v. United States Gypsum, supra,* and this court in *Frady,* does not appear to have weakened the importance of those holdings, or overruled those principles.

CONCLUSION

Petitioner herein has never had a ruling on the substantive merits of the claim he now asserts. The courts below have uniformly denied this relief on procedural grounds and petitioner has never been afforded the opportunity to present evidence bearing upon this question. Error of constitutional dimension has been demonstrated and no waiver has been shown and petitioner is entitled to the relief he has requested.

RESPECTFULLY SUBMITTED this___day of November, 1983.

J. WAYNE GILLMAN
Attorney for Petitioner
Virgil Redmond
Metropolitan Law Building
431 South 300 East, No. 101
Salt Lake City, Utah 84111
Telephone: (801) 322-1616

APPENDIX A

ORDER AND JUDGEMENT, United States Court of Appeals For The Tenth Circuit, No. 82-2609 (D.C. No. C-81-0628J, D. Utah)

UNITED STATE COURT OF APPEALS
FOR THE TENTH CIRCUIT

VIRGIL REDMOND	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 82-2609
	)	(D.C. No. C-81-0628J)
UNITED STATES OF AMERICA	)	(D. Utah)
Defendant-Appellee.	)	

ORDER AND JUDGMENT

Before SETH, Chief Judge, BARRETT and McKAY, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed.R.App.P. 34(a), this appeal came on for consideration on the briefs and records on appeal.

This is an appeal from the order of the district court dismissing plaintiff's petition for habeas corpus relief. The petition was properly treated as a motion pursuant to 28 U.S.C. Section 2255. Plaintiff has not shown cause and prejudice for the failure to object to the challenge instructions at trial or the failure to assert their unconstitutionality on direct appeal. Accordingly, the trial court properly dismissed the petition. See United States v. Frady, 456 U.S. 152 (1982).

The judgment of the United States District Court for the District of Utah is AFFIRMED. See 10th Cir. R. 17(b).

The mandate shall issue forthwith.

HOWARD K. PHILLIPS, Clerk

APPENDIX B

MEMORANDUM OPINION AND ORDER, United States District Court, District of Utah, Central Division, Civil No. C-81-0628-J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

VIRGIL S. REDMOND, Plaintiff,	)	Civil No. C 81-0628-J
	)	MEMORANDUM
vs.	)	OPINION
	)	and
UNITED STATES OF AMERICA Defendant.	)	ORDER

On May 6, 1974, the petitioner, Virgil Redmond, was indicted by a federal grand jury sitting in this district on charges of mail fraud in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C.A. Section 77q(a) (1981). The petitioner was convicted on nine of the ten counts of the indictment in early October, 1975. Asserting a number of grounds, petitioner appealed his conviction to the United States Court of Appeals for the Tenth Circuit, which affirmed his conviction on January 4, 1977. *United States v. Redmond*, 546 F. 2d 1386 (10th Cir. 1977). A petition for rehearing by the Court of Appeals was denied, as was a subsequent petition for a writ of certiorari filed with the Supreme Court. *United States v. Redmond*, 435 U.S. 995 (1978) (memorandum order). The petitioner then sought relief pursuant to Rule 35 of the Federal Rules of Criminal Procedure. This Court, Judge Fred M. Winner of the District of Colorado sitting by designation, granted petitioner's

Rule 35 motion in large part and reduced his sentence substantially.

Subsequently, petitioner sought to set aside his conviction and sentence pursuant to 28 U.S.C. Section 2255 (1976) ed.). *Redmond v. United States*, No. C 79-310 (D. Utah filed May 30, 1979). The petitioner raised numerous instances of alleged error on the part of the trial court, one of which this Court, Judge Jenkins presiding, found to be of insufficient merit to warrant Section 2255 relief. *Redmond v. United States*, C-79-310 (D. Utah dec. Oct. 23, 1979). Neither on direct appeal nor on this first Section 2255 motion had petitioner raised any question concerning the trial court's jury instructions concerning intent. The petitioner did not appeal from the denial of his first Section 2255 petition. Instead he filed a section 2255 motion, this time alleging that the trial court's jury instruction concerning intent placed at least part of the burden of proof upon the defendant, an unconstitutional denial of due process of law according to the petitioner. See e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979). This court, Judge Winner presiding, summarily denied the second Section 2255 petition. Once more the petitioner did not prosecute a direct appeal.

On August 25, 1981, twenty-two days after the time for filing a notice of appeal on the second Section 2255 motion had run, petitioner commenced this action, seeking habeas corpus relief pursuant to 28 U.S.C. Section 2241 (1976 ed.) and again raising the issue of the purportedly defective jury instruction.

On November 2, 1981, arguments in this action were heard by Magistrate Daniel Alsup. Following careful consideration of the questions raised, the Magistrate issued his Report and Recommendation on December 21, 1981.

The Magistrate first held relief under Section 2241 to be legally inappropriate. See also *Arrington v. Willingham*, 362 F.2d 803 (10th Cir. 1966); *McDonnel v. Willingham*, 354 F. 2d 232 (10th Cir. 1965). Because the petition was submitted pro se, however, the Magistrate afforded Mr. Redmond's plead-

ings a liberal construction, see *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), and, noting that Mr. Redmond was no longer "in custody . . . of the United States" within the meaning of the habeas corpus statutes, see *United States v. Condit*, 621 F.2d 1096 (10th Cir. 1980), he ultimately deemed the petition to be a Section 2255 motion seeking a writ of coram nobis, citing *Carafas v. LaVallee*, 391 U.S. 234, 238-240 (1968).

> The writ of error coram nobis
>
> at common law was employed in order to bring before the court a judgment previously rendered by it for the purpose of review on account of some error in fact affecting the validity and regularity of the proceedings.

United States v. Moore 166 F.2d 102, 104 (7th Cir. 1948), cert. denied, 334 U.S. 849.[1] "It is in the nature of an attack on a judgment of conviction, valid on its face, but defective by reason of facts outside the record which deprived [the] accused without fault on his part of the constitutional right to a fair trial." 24 C.J.S. Criminal Law Section 1606(2), at 667 (1961) (footnote omitted). Coram nobis is a collateral attack upon a judgment which should be allowed "only under circumstances compelling such action to achieve justice." *United States v.*

---

1 The formal title of the writ, "Quae Coram Nobis Resident" means, "Let the record remain before us." See *Hendricks v. State*, 297 P.2d 576, 578 n.1 (Okla.Cr.App. 1956)

Morgan, 346 U.S. 502, 511 (1954).[2] See also *Kagen v. United States*, 360 F.2d 30, 32 (10th Cir. 1966); *Alire v. United States*, 339 F.2d 702, 703 (10th Cir. 1964) (per curiam); *Igo v. United States*, 303 F.2d 317, 318 (10th Cir. 1962); *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963).

The common law writ of error coram nobis, though nominally abolished by Rule 60, Federal Rules of Civil Procedure, remains available pursuant to the All Writs Statute, 28 U.S.C. Section 1651(a) (1976 ed.). See *United States v. Morgan*, 346 U.S. 502, 506-511 (1954); *United States v. Taylor*, 648 F.2d 565, 570 n.14 (9th Cir. 1981); Annot., 38 A.L.R. Fed 617 (1978 & supp. 1982); a Section 2255 motion "can be treated as an application for a writ of coram nobis . . . in an appropriate case." *Igo v. United States, supra*, 303 F.2d at 318, see *Scarponi v. United States*, 313 F.2d 950 (10th Cir. 1963); *Williams v. United States*, 267 F.2d 559 (10th Cir. 1959). Where a sentence and conviction are sought to be vacated by means of a petition for a writ of error coram nobis, there is a presumption that such judgment of conviction is correct and valid. See *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963); *Byrnes v. United States*, 408 F.2d 599, 602 (9th Cir. 1969); *United States v. Marcello*, 210 F. Supp.

---

[2] The writ of coram nobis originated in 16th century England as a means of allowing a litigant to challenge a judgment, civil or criminal, on the basis of an error in fact. Traditionally, as applied in criminal cases, the writ was available only if (1) the factual error complained of did not appear on the face of the record, (2) the failure of the defendent to call the error to the attention of the trial court was excused by duress, fraud, or an excusable mistake, and (3) the error was fundamental and resulted in a miscarriage of justice.

Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure, 1577 n.h (5th ed. 1978) (emphasis added).

892 (D.La. 1962) affirmed 328 F.2d 961 (5th Cir. 1964) cert. denied 377 U.S. 992 (1964).

While there is some authority for the view that the coram nobis remedy may address strictly legal as well as material factual errors, see *United States v. Wickham*, 474 F. Supp. 113, 116 (C.D.Cal. 1979), a review of the case law and other authorities discloses that errors of law standing alone are excluded from the causes for which a writ of coram nobis may issue. See *Taylor v. Alabama*, 335 U.S. 252, 254, 259-261 & n.4 (1948); *Owensburg v. United States*, 353 F.2d 412, 417 10th Cir. 1965), cert. denied, 383 U.S. 962 (1966) ("[A] motion in the nature of coram nobis must be directed to matters of fact, . . ."); *Scarponi v. United States*, 313 F.2d 950, 952 (10th Cir. 1963) ("[T]he ancient writ of coram nobis is available to correct errors of fact."); *Moon v. United States*, 272 F.2d 530, 532 (D.C.Cir. 1959) ("[T]he function of the writ was primarily to correct errors of fact on the part of the trial court, . . . "; 18 Am.Jur. 2d Coram Nobis Section 3 at 456 & n.7 (1965). The Court of Appeals for the Tenth Circuit instructs that "substantively coram nobis is a form of extraordinary relief which errors of fact under compelling circumstances in order to achieve justice." *McDonald v. United States*, 356 F.2d 980, 981 (10th Cir. 1966) cert. denied 385 U.S. 936 (1966).

Petitioner in this action does not allege a compelling factual error either extrinsic or intrinsic to the trial record.[3] Rather, he asserts that his constituional rights were prejudiced

---

[3] The Magistrate notes that the petitioner alleges inadequate representation of counsel in connection with the delivery by the trial court of the challenged instruction. While claims concerning inadequate representation by counsel may properly be the subject of coram nobis proceedings, see Annot., 38 A.L.R.Fed. 617, 645-654 (1978), those raised here are tangential to the central question of the jury instruction itself, and are now determined to be without independent substantive merit sufficient to justify coram nobis relief.

by an error of law found in the trial court's instructions to the jury. Direct appeal, not a writ of error coram nobis, is the traditional means of correcting the errors of the trial court on matters of law appearing in the record. The prior reported cases have denied coram nobis relief pertaining to errors in jury instructions, emphasizing the primary significance of the appealable remedy. See *Azzone v. United States*, 341 F.2d 417, 419 (8th Cir. 1965), cert. denied 390 U.S. 970 ("Coram nobis may not be used as a substitute for an appeal. The questions whether the court's instructions were prejudicial may not be reviewed in this proceeding."); *Lopez v. United States*, 217 F.2d 526 (9th Cir. 1954); *United States v. Bloom*, 144 F. Supp. 808, (D.N.Y. 1956). The courts have observed more than once that coram nobis relief "will not ordinarily be granted 'to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.' *Howell v. United States*, 4th Cir., 172 F.2d 213, 215, certiorari denied 1949, 337 U.S. 906 . . . " *Moon v. United States, supra*, 272 F.2d at 532; see also *Lipscomb v. United States*, 273 F.2d 860, 865 (8th Cir. 1960), cert. denied 364 U.S. 836 (1960).

The petitioner's present challenge to the trial court's instruction on intent, even aided by the sharpened hindsight afforded by *Sandstrom v. Montana*, 442 U.S. 510 (1979),[4] is an inappropriate question for review in coram nobis proceedings.

Even assuming arguendo that Redmond does raise an issue properly within the scope of the writ, the courts have held that an issue that has been resolved against a defendant on a Section 2255 motion cannot be relitigated in coram nobis proceedings "[i]n the absence of credible new evidence or a change of law." *Willis v. United States*, 654 F.2d 23, 24 (8th Cir. 1981). In

---

[4] Everyone has seemingly assumed up to this point that the 1979 decision in *Sandstrom* is retroactively applicable to petitioner's 1975 criminal trial. That certainly poses an interesting question.

Willis, the petitioner challenged the indictment procedure in his case by Section 2255 motion in 1974 and again by coram nobis petition in 1979. Noting that the denial of Section 2255 relief had not been appealed, and noting the identity of issues raised in both proceedings, the Court of Appeals concluded that Willis had "made no showing warranting reconsideration of his claim." *Id.*

Similar facts obtain here. Redmond's second Section 2255 motion raised the jury instruction issue. Though it was denied summarily, the Section 2255 motion certainly raised the question in a fashion that was ripe for review by the Court of Appeals. Yet no appeal was taken. To the extent that the Report and Recommendation of the Magistrate would substitute coram nobis relief for that appeal not taken, this Court declines to adopt that report.

No different result is arrived at even if the petitioner's pleadings are treated as a petition for Section 2241 or Section 2255 habeas corpus relief. Redmond commenced this proceeding while still "in custody" of the United States as a federal parolee. Following the guidance of the Court in *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court could readily conclude that under the relevant statutes, once jurisdiction has attached in this Court it is not defeated by the lapse of petitioner's parolee status prior to completion of the proceedings. *Id.*, 391 U.S. at 238. Indeed, the statute provides that "[t]he court shall . . . dispose of the matter as law and justice require," 28 U.S.C. Section 2243 – relief not limited to a release from custody.

As the Magistrate observed, however, the statutes restrict the use of successive petitions to raise the same issue over and over again. The last paragraph of 28 U.S.C. Section 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for

> relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. [Emphasis added.]

In his report, the Magistrate concluded that Redmond had not established the inadequacy of the Section 2255 remedy – a prerequisite to his now petitioning for Section 2241 relief. This Court agrees.

Treating his pleadings as yet a third Section 2255 motion, this Court determines that relief should be denied. As the court observed in *Johnson v. Petrovsky*, 626 F.2d 72, 73 (8th Cir. 1980) (per curiam):

> [E]ven when viewed in light of the liberal construction traditionally given pro se petitions, see *Hill v. Wyrick*, 570 F.2d 748, 757 (8th Cir.), cert. denied, 436 U.S. 921 . . . (1978); *Wilwording v. Swenson*, 502 F.2d 844, 847 n.4 (8th Cir. 1974), Johnson's second motion is, in substance, merely another section 2255 motion. A court is not bound to entertain successive motions for similar relief. 28 U.S.C. Section 2255. In *Sanders v. United States*, 373 U.S. 1, 9, . . . (1962), the Supreme Court held that "nothing in Section 2255 requires that a sentencing court grant a hearing on a successive motion alleging a ground for relief already fully considered on a prior motion and decided against the prisoner."

The statute itself expressly eschews duplicative motions:

> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

Even under the reading of Section 2255 expressed in *Sanders v. United States*, 373 U.S. 1, 15-17 (1963), a defendant is not free to squirrel away his allegations of trial court error for use in successive petitions. See *id.*, 373 U.S. at 9-12; *Wong Doo v. United States*, 265 U.S. 239 (1924). Petitioner offers, for example, no substantial excuse for not having raised the "inadequate representation by counsel" question as to the jury instructions considered in the second Section 2255 motion.[5] While plainly the traditional doctrine of res judicata does not apply to habeas corpus proceedings. *Sanders v. United States, supra*, 373 U.S. at 6-13, the Judicial Code invests considerable discretion in the trial court where successive similar Section 2255 motions are concerned. Applying the *Sanders* criteria to the petitioner's circumstances herein, this Court concludes that the "ends of justice would not be served by reaching the merits" of questions earlier presented and resolved. Petitioner herein, like the petitioner in *Carafas v. LaVallee, supra*, 391 U.S. at 240 n.13, was free to pursue the questions raised on prior occasions through the available avenues of direct appeal. See e.g., *Wainwright v. United States*, 448 F.2d 984, 986-987 (10th Cir. 1971). He chose not to do so. He may not once more pursue them here. See *Johnson v. Petrovsky, supra; Willis v. United States, supra.*

---

5 "[A]n applicant must show reasonable diligence in presenting his claim." *United States v. Moore*, 166 F.2d 102, 105 (7th Cir. 1948), cert. denied, 334 U.S. 849. Were the rule otherwise, a defendant could conceivably raise his contentions of error one at a time, motion after motion. At some point, this process becomes an abuse of the judicial process itself. E.g., *United States v. Hanks*, 340 F. Supp. 625, 628 (D.Kan. 1972).

Insofar as the Report and Recommendation of the Magistrate is consistent with this opinion it is hereby ADOPTED. To the extent it is inconsistent, this Court declines to so adopt. Plaintiff's petition should be DISMISSED.

DATED this 7th day of December, 1982.

BY THE COURT:

BRUCE S. JENKINS
United States District Judge

Copies mailed to counsel 12/7/82: mw
Wayne Gillman, Esq.
Samuel Alba, AUSA

APPENDIX C

REPORT AND RECOMMENDATION, Honorable Daniel A. Alsup, United States Magistrate, United States District Court, District of Utah, Central Division, Case No. C-81-0628J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

VIRGIL S. REDMOND Petitioner,	)	
	)	Case No. C-81-0628J
vs.	)	
	)	REPORT AND
UNITED STATES OF AMERICA, Defendant.	)	RECOMMENDATION

The petitioner, Virgil S. Redmond, has prosecuted extensive post conviction proceedings. A direct appeal of his conviction in this court was dismissed on January 4, 1977. A petition for rehearing was denied on December 21, 1977. A petition to the United States Supreme Court for a writ of certiorari was denied. Then a motion for a reduction in the petitioner's sentence was granted in large part by Chief Judge Fred M. Winner of the District Court of Colorado sitting on this court by invitation. A motion to amend, set aside or correct the conviction and sentence was then filed with this court. That motion alleged numerous claimed trial errors, but not the claim made in this petition that error was committed by the trial court in its instructions to the jury. That motion was denied summarily. Then a second Section 2255 motion was filed and it was considered and denied summarily by Chief Judge Winner. It was claimed in that motion that the moving defendant received a disproportionate sentence and error was

committed in the trial instructions to the jury. No appeal was taken from the order denying that motion or the denial of the motion resolved by this court. Then the petitioner filed this present petition on August 25, 1981, just 22 days after expiration of the time for appealing the denial order of Chief Judge Winner.

The present petition was filed pro se under 28 U.S.C. Section 2241, and the petitioner has alleged there is no other remedy available to him, relief under 28 U.S.C. Section 2255 having been denied. It is claimed in this petition that the trial court committed constitutional error in its instructions to the jury and retained counsel failed to provide effective assistance as guaranteed by the Sixth Amendment to the United States Constitution.

This Section 2241 petition is not proper. A denial of relief on a Section 2255 motion does not establish the inadequacy of that remedy. *Arrington v. Willingham*, 362 F.2d 803 (10th Cir. 1966); *McDonnell v. Willingham*, 354 F.2d 232 (10th Cir. 1965). However, this petition was filed pro se. It must receive a liberal interpretation by the court, and the fact that it was submitted in improper form should not preclude its consideration. *Haines v. Kerner*, 404 U.S. 519 (1972). Even when a moving defendant has legal representation it is likely the court should not dismiss an application on the basis of form when it appears the application might have substance. *Sanders v. United States*, 373 U.S. 1(1963). *Johnson v. Zerbst*, 304 U.S. 458 (1938). The magistrate, therefore, considered the petition as a motion under Section 2255.

When the petition was filed on August 25, 1981, the defendent was a federal parolee. As a parolee he was in custody for the purpose of a Section 2255 motion. *Argro v. United States*, 505 F.2d 1374 (2nd Cir. 1974); *United States v. Condit*, 621 F.2d 1096 (10th Cir. 1980). In October 1981, the defendant's parole was terminated. He was then no longer in custody. That does not terminate the matter, however.

The defendant's collateral attack was before the court when parole was terminated. The motion must be considered by the court as a petition for a writ of coram nobis, *Carafas v. La Vallee*, 391 U.S. 234 (1968). Consequences of the conviction remain despite the termination of the sentence. For example, by affidavit the defendant has stated that he has sought and still seeks an expungement of an early State court criminal conviction. Expungement is not available to him with this present federal conviction. See also *Lebron-Rosario v. United States*, 493 F.2d 318 (1st Cir. 1974); *McDonald v. United States*, 356 F.2d 980 (10th Cir. 1966); *Blair v. United States*, 349 F.2d 405 (10th Cir. 1965).

As a collateral attack on the conviction this is a successive motion or petition. There is a question whether it need be or should be considered by the court. The court's discretionary power to refuse to entertain successive collateral motions or petitions is limited. It may refuse to consider such motions or petitions when:

1. The prior motion was dismissed on its merits, or
2. No new constitutional issues are raised by the new application; and
3. There is no requirement of "substantial justice" that the new application be granted, *Sanders v. United States, supra.* The court explained that a prior adjudication of the merits means that if factual issues were raised in the prior application and the files and records did not conclusively resolve those issues, an evidentiary hearing was held.

Neither of the issues raised in this petition has been previously considered and dismissed on the merits. In considering the claimed jury instruction error the court determined summarily that it was an issue that should have been raised on a direct appeal of the conviction. The claimed ineffective assistance of counsel was raised in the prior motion in a different context than it is raised in this petition. It was determined summarily that as raised in that motion the issue

had been considered and resolved on direct appeal. In this petition it is claimed counsel was ineffective in failing to object to an improper jury instruction and in failing to raise the alleged error on direct appeal. Under the standard fixed in *Sanders v. United States*, this present petition cannot properly be dismissed as successive. The issues raised have not previously been resolved on the merits.

Directing attention only to the claim with respect to the jury instruction, this is a claim that could have been raised on the direct appeal. A collateral motion cannot serve the purpose of an appeal. *United States v. Cox*, 567 F.2d 930 (10th Cir. 1977); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971). However, when a claimed error is raised, including claimed errors in instructing the jury, and the effect of the error was to render the trial fundamentally unfair in a constitutional sense, failure to raise the issue on direct appeal does not preclude the granting of collateral relief. *Merrill v. United States*, 559 F.2d 240 (9th Cir. 1979); *Lorraine v. United States*, 444 F.2d 1 (10th Cir. 1971). *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1975). The jury instruction attacked by the defendant must be examined to determine if under the *Sanders v. United States* standard there is a "substantial justice" requirement that this petition be considered.

First, however, it must be determined if the United States Tenth Circuit Court of Appeals did consider and resolve on the direct appeal the jury instructions issue. In its opinion, *United States v. Redmond*, 546 F.2d 1386 (10th Cir. 1977), at page 1390, the court stated: "We find no error in the refusal by the trial courts as to the requested instructions. We must conclude that the defendants have shown no error in the instructions given or refused." That is quite preclusive language. Nonetheless, a review of the defendant's brief on appeal discloses that the claimed error in the specific instruction herein attacked was not raised on the direct appeal. It was not one of the issues raised on the appeal. It was not presented to the appellate

court. That court was not given opportunity to consider it. Nor is there a suggestion in the record that it was deliberately by-passed or reserved or withheld by the defendant to be raised later by motion. *Sanders v. United States, supra, Fay v. Noia,* 372 U.S. 391 (1963). Nor was the failure of the defendant to object to an erroneous instruction at the trial a waiver under Rule 12 F.R.C.P. or any other rule if the error was of constitutional dimension or inherently resulted in a complete miscarriage of justice. *Merrill v. United States,* 599 F.2d 240 (9th Cir. 1979); *Howard v. Dagget,* 526 F.2d 1388 (9th Cir. 1976). Also, see on the issue of waiver and harmless error, hereinafter discussed, *McGuinn v. Crist,* 492 F.Supp. 478 (D. Mont. 1980). This case contains an excellent review of the Sandstrom decision. The court granted a habeas petition under 28 U.S.C. 2254 because the trial court gave an erroneous "presumption" instruction. In spite of the numerous post conviction proceedings prosecuted by the defendant and even at this late date the claimed constitutional error may now be raised. *Sanders v. United States, supra, Kaufmann v. United States,* 394 U.S. 217 (1969).

In its unnumbered instruction at page 893 of the transcript the court instructed the jury that

> "You are instructed that an essential element of the securities offenses charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.
>
> "Intent, as used here means that a defendant must have had the purpose or willingness to defraud in his mind. Existence of intent to devise or conduct such a scheme may be shown by the facts and declarations of the parties concerned and the surrounding circumstances as well as by direct evidence.
>
> "Experience shows that direct evidence of fraudulent intent is not generally to be expected, and for

that reason, the law permits a resort to circumstantial evidence as a means for finding the truth. Moreover, since intent is largely a state of mind and it is impossible to look into a man's mind to see what went on, the only way you have to determine that question is to take into consideration all the facts and circumstances shown by the evidence. And one must also bear in mind that an intent may be inferred from the act, itself. For it is the law that a person intends the usual and probable consequences of his act."

The due process clause of the United States Constitutional Fifth Amendment protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Re Winship v. United States*, 397 U.S. 358 (1970). The defendant was charged under 15 U.S.C. Sections q(a) and 77x with the use of the mails in the fraudulent sale of securities. Criminal intent was an essential element of the charged offense.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the court considered a jury instruction somewhat similar to that given in the defendant's trial. In that case the instruction in a criminal case was that "the law presumes that a person intends the ordinary consequences of his voluntary acts." That instruction was similar to the one here under attack but not identical in legal effect. In *Sandstrom* the jury was told it could draw a presumption of intent. In the defendant's trial the jury was told not that a presumption could be drawn, but that the law requires the drawing of that presumption.

The United States Supreme Court in *Sandstrom* stated that every element of the offense must be proved beyond a reasonable doubt and there is an overriding presumption of innocence. It stated that telling the jury it could presume intent could be interpreted as shifting the burden of proof to the defendant on this one essential element. The defendant might be required,

in the jurors' minds, to move forward and overcome the presumption. The instruction might be interpreted as a mandatory presumption rather than a permissive inference. It thus might be a shifting of the burden of proof and a violation of the defendant's Fifth (and Fourteenth) Constitution Amendment right to a presumption of innocence and his right not to be convicted except upon proof of each element of the offense beyond reasonable doubt. The instruction was condemned.

If that instruction was constitutionally impermissible, the one given at the defendant's trial was even more so. The language is even less permissive and more mandatory and thus more susceptible to the criticism that the burden on an essential element of the charged offense was shifted to the defendant.

Its decision in ***Sandstrom v. United States*** was in large measure a reaffirmance of the United States Supreme Court's earlier decision in ***Morissette v. United States***, 542 U.S. 246 (1952), wherein the court stated that ". . . the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." It stated that "A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense," and "a presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which a jury should reach on its own volition."

The due process clause of the United States Constitution protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged. In ***Re Winship***, 397 U.S. 358 (1970). The instruction given by the trial court was violative of that constitutional due process concept. It was an error of constitutional significance resulting in a fundamental unfairness. It is not claimed by the respondent that it was a harmless error. To say that a constitutional error was harmless, it must be determined that it was harmless beyond a reasonable

doubt. *Chapman v. California*, 386 U.S. 18 (1967). The full set of instructions given to the jury has been examined. There is nothing in those instructions or in the rest of the instruction on intent that softens the prejudicial effect of the instruction concerning intent. The absence of criminal intent was one of the defenses raised at the trial.

There being a constitutional error resulting in possible fundamental unfairness, the failure to object to the instruction is not a waiver. That it was not raised on the direct appeal and that this is one of several successive collateral attacks does not permit a dismissal of this petition.

Coram nobis is an extraordinary remedy, and relief should be granted "only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502 (1954). Much time has elapsed since the occurrence of the events giving rise to the charges against the defendant; memories have faded; witnesses may not be available; and the defendant has served his reduced sentence. A re-trial may not be likely. There is thus even greater need for caution. Nonetheless, this fundamental constitutional error on an important issue at the trial is a compelling circumstance requiring that the writ be granted to achieve justice.

It is recommended that the petition be construed as one seeking coram nobis relief and that the petition be granted.

Copies of this Report and Recommendation are being served upon the parties. They are advised of their right to file objections hereto within 10 days from the date hereof.

DATED this 21st day of December, 1981.

DANIEL A. ALSUP
United States Magistrate

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Report and Recommendation to J. Wayne Gillman, Esq., 431 South 300 East, No. 101, Salt Lake City, Utah 84111 and to Samuel Alba, Assistant United States Attorney, Room 200, U.S. Post Office & Courthouse, 350 South Main, Salt Lake City, Utah 84101, on this 21st day of December, 1981.

Clerk

APPENDIX D

ORDER, United States District Court, District of Utah, Central Division, Honorable Fred M. Winner, Case No. CR-74-52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL ACTION
	)	NO. CR74-52
vs.	)	
	)	
VIRGIL REDMOND,	)	ORDER
Defendant.	)	

Petitioner has asked a rehearing of his application under 28 U.S.C. Section 2255. He says that I overlooked that he still claims error in the instructions. I didn't overlook the claim, but I thought that it was so well settled that trial errors of this sort can't be raised by a Section 2255 petition that I didn't mention it. I mention it now, and petitioner's motion to vacate and set aside sentence is denied again because the claimed error is not something to be reached under the narrow scope of 28 U.S.C. Section 2255.

Dated this 2nd day of June, 1981.

FRED M. WINNER
United States District Judge

Copies mailed to counsel 6-4-81cn:
Ronald L. Rencher, U.S. Atty.
Virgil Redmond, def.